

State's Response to Defendant's Motion for Change of Venue

Defendant must establish presumed or actual prejudice before the place of trial will be changed based on pretrial publicity.

MEMORANDUM OF POINTS AND AUTHORITIES

Defendant seeks a change of venue under Rule 10.3, Ariz.R.Crim.P., alleging that prejudicial pretrial publicity will prevent him from receiving a fair trial. However, defendant has not shown any presumed prejudice or any actual prejudice that cannot be remedied through voir dire. Therefore, defendant's motion should be denied.

"There is a two-step inquiry for pretrial publicity: (1) did the publicity pervade the court proceedings to the extent that prejudice can be presumed?; if not, then (2) did defendant show actual prejudice among members of the jury? . . . The defendant has the burden of showing prejudice." *State v. Murray*, 184 Ariz. 9, 26, 906 P.2d 542, 559 (1995). "Prejudice may be presumed if the publicity 'was so extensive or outrageous that it permeated the proceeding or created a "carnival-like atmosphere."' . . . The adverse publicity must be so extensively pervasive and prejudicial that 'the court cannot give credibility to the jurors' attestations, during voir dire, that they could decide fairly.' . . . This is a high standard and it is rarely met. We have refused to presume prejudice when the publicity was 'primarily factual and non-inflammatory or if the publicity did not occur close in time to the trial.'" *State v. Davolt*, 207 Ariz. 191, 206, 84 P.3d 456, 471 (2004). In the absence of presumed prejudice, the defendant must establish actual prejudice by showing that "the jurors have formed preconceived notions

concerning the defendant's guilt and that they cannot leave those notions aside.' . . . Prior knowledge of the case alone is insufficient to disqualify a juror. . . . The critical inquiry is the 'effect of publicity on a juror's objectivity.'" *Id.* "In evaluating pretrial publicity, we focus on the effect rather than the amount of publicity." *State v. George*, 206 Ariz. 436, 445, 79 P.3d 1050, 1059 (App. 2004).

Defendant cites four "problems" with publicity in this case. First, he states that more than half of the prospective jurors in his federal trial had to be excused because they were "familiar" with the case. However, this indicates that voir dire eliminated any jurors who showed bias. "An examination of the jurors, through voir dire process, is an effective means by which to determine the effects or influence of pretrial publicity on the jurors." *State v. Greenawalt*, 128 Ariz. 150, 163, 624 P.2d 828, 841 (1981). In addition, under Arizona law, mere familiarity with a case is insufficient to disqualify a juror. *Davolt, supra*.

Second, defendant states that "there was a good deal of publicity." However, the court "considers the effect of pretrial publicity, rather than its quantity." *State v. Blakley*, 200 Ariz. 229, 239, 25 P.3d 717, 727 (2003). Nevertheless, defendant has produced only a handful of articles that mention him. In *State v. Jones*, 197 Ariz. 290, 307, 4 P.3d 345, 362 (2000), the court found that more than 800 articles did not create a presumption of prejudice. Defendant also acknowledges that most of the articles are old. He has not shown that the publicity was so pervasive that he cannot receive a fair trial.

Third, defendant raises the issue that judges in the county may be biased. However, Rule 10.3(a) states that a change of venue may be sought for reasons

other than interest or prejudice of the trial judge. If defendant believes that the trial judge is prejudiced, defendant must seek a change of judge for cause under Rule 10.1. There is no evidence here of interest or prejudice on the part of the trial judge.

Fourth, defendant is concerned that jurors can access news articles online. However, this cannot be remedied by a change of venue. Such concerns can be addressed during voir dire and by admonishing jurors who are empaneled.

Rule 10.3(b) requires defendant to prove that dissemination of any prejudicial publicity will “probably” result in him being denied a fair trial. Defendant has not met the high standard for showing presumed prejudice nor has he met his burden under Rule 10.3(b). The jury pool in Maricopa County is large enough that finding impartial jurors through the voir dire process should not be difficult. Changing the venue is unnecessary and would inconvenience victims and witnesses. Therefore, the State respectfully requests that this Court deny defendant's motion for change of venue.